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Supreme Court of the United States

OCTOBER TERM, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondents, American Guarantee and Liability Insurance Company and Henry O. Mac Donell, present this petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

Grounds for Rehearing

The Court erred:

1) in holding the Louisiana Wrongful Death Statute unconstitutional, while simultaneously holding that such statute confers a cause of action on the mother of an illegitimate child;

2) in failing to recognize the basic distinction between the *Levy* and *Glona* cases;

3) in holding that the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution prohibits the state from limiting recovery for wrongful death to those parents who have legitimated their illegitimate offspring; and

4) in finding that Louisiana has followed an inconsistent course in its sanctions against illegitimacy.

ARGUMENT

While conceding that this Court has the power to hold a state statute unconstitutional, respondents challenge the Court's action in re-writing the Louisiana Wrongful Death Statute so as to create a cause of action in favor of the petitioners in the *Glona* and *Levy* cases. Petitioners' attack on the constitutionality of the Wrongful Death Statute was, from its very inception, illogical, as they were seeking rights under the very statute which they challenged as unconstitutional. This incongruous position was clearly recognized in the case of *Benjamin v. Hardware Mutual Casualty Co.*, 244 F.S. 652 (W.D. La., 1965), wherein the Court held as follows:

> "In addition to the arguments as to the status of these minors, plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not af-

> ford them an opportunity to sue for the wrongful death of their parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose."

Thus, if the Court adheres to its original judgment that Article 2315 is unconstitutional, then there is no valid Louisiana Wrongful Death Statute at the present time, and no one, legitimate or illegitimate, has a cause of action, until such time as the Louisiana legislature enacts a new statute. This Court does not have the constitutional power to enact state laws, merely to set them aside if they violate the Equal Protection Clause of the Fourteenth Amendment.

The majority opinion seems to be more concerned about the fact that, unless recovery is granted to petitioners in these two consolidated cases, the tortfeasors will "go free" or receive "a windfall" than about the legal issues involved and the far-reaching consequences of these decisions, which, in effect, prohibit the State from enacting any laws which confer greater rights on legitimate relations than on illegitimate ones.

If the alleged tortfeasor in the *Levy* case "goes free", it is because the party entitled to bring a suit, the mother of the decedent, failed to exercise her rights. If the alleged tortfeasor in the *Glona* case "goes free",

it is because petitioner, although herself now a legal wife and enjoying all of the benefits resulting from such status, has withheld legitimate status from her son for nineteen years.[1]

In *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir., 1964), cert. den. 379 U.S. 844, the tortfeasor went free because the plaintiff, although dependent upon the decedent could not qualify as his legal wife merely because she failed to go through another marriage ceremony following the divorce of the decedent from his former wife.[2]

In many jurisdictions, a cause of action for wrongful death will abate unless the decedent is survived by the beneficiaries designated by statute. Thus, the tortfeasor "goes free." In short, the fact that in isolated instances a tortfeasor may go free is no legal justification for changing an otherwise valid and constitutional law.

The Court refers to the Louisiana Wrongful Death Statute, Article 2315 of the Louisiana Civil Code, as a law dealing with "sin."[3] While, of necessity, any law

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[1]App. 5, Article IV of the complaint.

[2]In the *Bell* case, plaintiff was the de facto, although not the legal wife of the decedent. In this case, petitioner is the de facto or biological, but not the legal mother of the decedent. Thus, from a legal viewpoint no distinction can be made between the two cases.

[3]The reference to "sin" is apparently based on the language in the Court of Appeal's opinion in the *Levy* case to the effect that "Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wed-

granting rights to legitimate relations withholds such rights from illegitimates, and, to that extent, indirectly or remotely deals with "sin", the real purpose for granting greater rights to legitimates is to encourage marriage, to protect the legitimate family unit and the property rights flowing therefrom. Some may argue that marriage is not a desirable state and should not be accorded the protection and, indeed, the encouragement by the State, but as late as 1967 this Court stated in *Loving v. Commonwealth of Virginia*, 87 S.Ct. 1817 at 1824 that:

> "Marriage is one of the 'basic civil rights of man' *fundamental to our very existence and survival.*"
>
> (Emphasis supplied)

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lock." It should be noted that the *Levy* opinion did not emanate from the highest court of the State of Louisiana, but from a three-member panel of an intermediate court, and represents the views of only one judge, apparently concurred in by the other two members of the panel. Thus, the pronouncement is not in any way conclusive as to the purpose of and reason for the law under attack herein.

As was forcefully stated in the Brief filed by the Attorney General of the State of Louisiana, p. 4, "Louisiana's purposes in granting greater rights to legitimates than to illegitimates are not the punishment of illegitimates and not even the discrimination against immorality in sexual behavior. Louisiana's purposes in the area are positive ones; the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the child, and the preservation of the security and certainty of property rights linked with family status."

As long as this Court is committed to the principle, that marriage is "fundamental to our very existence and survival", it is only logical, if not mandatory, that marriage be encouraged by the enactment of laws granting superior rights to legitimate family relations and protecting these rights against the claims of illegitimates. Needless to say, the protection of legal marriages and the creation and preservation of property rights linked with family status are certainly a strong inducement to enter into legitimate marriages. It is common knowledge that the proportion of marriages to avoid illegitimacy of a child, already conceived at time of marriage, is increasing.

By holding that under our constitutional regime all citizens have to enjoy correlative rights, this Court has not only extinguished all classifications between legitimates and illegitimates for all purposes, but, as poignantly observed in the dissenting opinion,[4] has abolished the rights of legitimates under certain conditions.

Under the rationale of the majority opinion, no state will any longer be permitted to draw any distinction between legitimates and illegitimates, be it in the area of Wrongful Death or Inheritance. All children, legitimate or illegitimate, will be entitled to equal rights in the estate of their father and mother. All children,

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[4] "Under the Court's opinion, the right of legitimate and perhaps dependent parents to sue will henceforth be cut off by the mere existence of an illegitimate child, though the child be a self-supporting adult, and though the child elect not to sue." Dissenting opinion, p. 3, footnote 5.

legitimate or illegitimate, will be entitled to sue for the Wrongful Death of either father or mother.[5] The recognition of legitimate and illegitimate children on an equal basis will reduce recovery by the legitimates in all cases where only a limited fund is available for the satisfaction of judgment and in all cases where the total recovery for wrongful death is limited by statute. The recognition of the biological parents on an equal basis with adoptive parents, will impair the rights of those who have cared for and nurtured and legitimated the child, and will award those who, perhaps by accident, fathered and conceived a child, but did not see fit to legitimate the child in the eyes of the law and society.

Considering the biological facts of conception and the difficulty to disprove paternity, it is almost inconceivable that anyone would advocate that the bereaved widow and legitimate children be subjected to the claims of alleged illegitimates who were never formally acknowledged by the decedent. Every illegitimate child has a biological father, but how many know their father?

In the final analysis, the issue before the Court in the Glona case are not unjust enrichment, not love, affection, dependency and the like, but as indicated in the dissenting opinion simply this:

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[5]At present, an illegitimate child may not recover for the wrongful death of his father in Louisiana, or generally in other states. 72ALR 2d 1235, 1239-42.

> If the State has the right to prescribe the formalities of marriage and refuse to recognize persons as husband and wife, unless they comply with such formalities, why does not the state have the concomitant right to require that the parent of an illegitimate child comply with the formalities for legitimation before such parent will be permitted to assert an action for the wrongful death of the child?

There can be little question that the children in the *Levy* case had no control over their status. Likewise, there is little question that the social stigma imposed upon an illegitimate child has no justification in fact, law or in equity. However, the same reasoning does not apply to either the father or the mother of an illegitimate child, as it is solely in the power, and within the free exercise of their volition and discretion to legitimate their illegitimate offspring. The State has not barred either the father or the mother of an illegitimate child from suing for the wrongful death. The State has merely required that before a parent, be it father or mother, can assert any rights for the Wrongful Death of an alleged child, he or she has to legitimate the child and formally recognize him. This is no more nor less than the requirement that people go through a marriage ceremony before they will be recognized as legal husband and wife, which has always been conceded to be within the State's power.

Petitioner's argument that there was no need to legitimate the child because, under Texas law, the mother may inherit from and sue for the death of an

illegitimate child, strikes us as shocking. Presumably, the purpose of legitimation is the removal of the social stigma and any legal disadvantages to the child and not the personal gain of the parent.

The majority's further statement that "Louisiana follows a *curious* course in its sanctions against illegitimacy" is apparently based upon a misconception of the rationale of the authorities cited in support of such statement. These authorities will be examined in the order cited by the Court:

1) "A common-law wife is allowed to sue under the Louisiana Wrongful Death Statute." The statement is only partially correct and, therefore, misleading. Louisiana does not permit its citizens to enter into common-law marriages, but considers such marriages as being nothing but a state of concubinage. *Succession of Marinoni,* 177 La. 592, 148 So. 888 (1933). However, under the Full Faith and Credit Clause of the United States Constitution Louisiana is required to and will recognize a common-law marriage if such marriage is a valid legal marriage in the State wherein it was consummated. Were it otherwise, a legal wife and legitimate children under Florida law would be branded concubine and illegitimates, respectively, if they moved to the State of Louisiana. Once the rationale of this law is understood, it is obvious that it is not the least *curious.*

2) "When a married woman gives birth to an illegitimate child, he is, with a few exceptions, conclusively presumed to be legitimate." This is correct. However,

before this law can be considered as curious, the reason therefor has to be examined. Surely, it cannot be presumed that the State condones the immoral conduct of a married woman any more than that of an unmarried woman. The real reason is set forth in *Lewis v. Powell,* 178 So.2d 769 (2nd Cir., 1965) as follows:

> "The policy so established has for its purpose the protection of innocent children born during marriage against scandalous attacks upon their paternity, inter alia, by the husband of the mother who may be seeking to avoid his obligations, or by others unscrupulously claiming the estate of the husband after death."

3) "Louisiana makes no distinction between legitimate children and illegitimate children where incest is concerned." True, no state does. Incest, by the very definition of the crime, is an act of sexual intercourse punishable by virtue of the relationship of the parties, either by consanguinity or by affinity.[6] Aside from any moral considerations, incestuous acts are undesirable because of the well-known adverse genetic effects on the possible offspring of such relationship. Thus, "the propinquity of kinship requisite to constitute the offense is generally declared to be that within which the parties are forbidden to marry."[7]

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[6]27 Am. Jur. "Incest", § 3, p. 289.
[7]See Footnote 6.

4) "A mother may inherit from an illegitimate child whom she has acknowledged and vice versa. If the illegitimate son had a horse that was killed by the defendant and then died himself, his mother would have a right to sue for the loss of that property." This is only partially correct. Absent legal heirs, such as wife and children, a natural mother inherits from the illegitimate child if she has "formally" acknowledged the child during his lifetime. *Succession of Lacosst,* 142 La. 673, 77 So. 497 (1918). Conversely, an illegitimate child may inherit from his mother even though he is only "informally" acknowledged. Petitioner did not "formally" acknowledge her son. Therefore, petitioner would *not* have the right to sue for the loss of the illegitimate son's horse. The foregoing shows that Louisiana has been consistent in its sanctions against illegitimacy. The required formalities have to be complied with irrespective of whether the mother is suing for the wrongful death of her illegitimate child or for the loss of property belonging to her deceased illegitimate child.

5) "If the illegitimate son were killed in an industrial accident at his place of employment, the mother would be eligible for recovery under the Louisiana Workmen's Compensation Act, if she were a dependent of his." This is partially correct. If the illegitimate leaves no surviving wife and minor children, the mother may recover workmen's compensation benefits if she is a "dependent" within the meaning of the statute. It should be noted that a person to be considered a "dependent" of a deceased employee need not be a blood relative nor bear to him the relationship of husband or widow

or lineal descendent or ascendant, brother, sister or child. Thus, a total stranger, not related to the employee by marriage or blood, may recover as a "dependent" if, in fact, depended upon the decedent for his support. *Patin v. T. L. James & Co.*, 218 La. 949, 51 So.2d 586 (1951). Again, this result under the Louisiana Workmen's Compensation Act does not betray any inconsistency on the part of the legislature, but merely accomplishes the purpose of the compensation act, which is considered remedial legislation, to be liberally construed in favor of its beneficiaries. *Archibald v. Employers' Liability Assur. Corporation*, 202 La. 89, 11 So.2d 492 (1942).

The majority opinion recognized that "opening the courts to suit of this kind may conceivably be a temptation to some to assert motherhood fraudulently, however, it failed to recognize the much graver danger that suits of this kind will be a temptation to some to assert fatherhood fraudulently and, even worse, to some to assert that they are the offspring of a decedent male, leaving the decedent's legitimate widow and children completely defenseless to rebut such fraudulent claims of alleged paternity.[8]

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[8]Under Louisiana law, legitimate children are forced heirs of their parents. They cannot be disinherited except for the causes listed in Article 1621 of the Louisiana Civil Code, which are as follows:

"1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.

2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.

3. If the child has attempted to take the life of either parent.

In conclusion, we submit that the Wrongful Death Statute has to be considered in the overall context of the Louisiana legal system, which is designed to encourage the formation of legal relationships, to grant rights based upon such legal relationships and to withhold the rights from those who fail to formalize their relations. Louisiana has in no way discriminated against the parents of illegitimate children and has not denied them the right to sue for the wrongful death of their children. The State of Louisiana only requires that a parent legitimate the child during the child's lifetime. This requirement does not evidence any discrimination against illegitimates but, on the contrary is conducive to fostering legitimation by making it advantageous to the parent to legitimate his or her illegitimate offspring.

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4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child [being a major] has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents."

If illegitimate children are entitled to the same rights as legitimate children, then they are forced heirs and cannot be disinherited except for the causes mentioned in Article 1621. Consequently, all Louisiana succession proceedings, whether testate or intestate, are henceforth subject to attack by the claims of illegitimate children.

Respondents submit that the solution to the problem of weighing the rights of the legitimates and illegitimates is not to abolish the classification, as this Court has done, but to encourage the establishment of legitimate relationships as the State of Louisiana has done in this instance when requiring that a parent legitimate his illegitimate offspring in order to gain rights to sue for the wrongful death of the child and to be recognized as an heir of the child.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that, upon further consideration, the judgment of the U.S. Court of Appeals for the Fifth Circuit be re-instated and made the final judgment of this Court.

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CERTIFICATE OF COUNSEL

I, David R. Normann, counsel for the above-named respondents do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

_____

David R. Normann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been served on Leonard Fagot, Esq., and William F. Wessel, Esq., 1605 National Bank of Commerce Building, New Orleans, Louisiana, and on Benjamin E. Smith, Esq., 1006 Baronne Building, New Orleans, Louisiana, by depositing same in the U. S. Mail, postage prepaid, addressed as above, this ____ day of June, 1968.

David R. Normann.